No. 86-361 (2)

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

DAVID C. ANDERSON, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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20 pp

QUESTION PRESENTED

Whether the court of appeals abused its discretion in adopting special procedures to govern its consideration of the large number of petitions for review filed by discharged air traffic controllers.

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OPINIONS BELOW

The opinions of the court of appeals in Nos. 85-1063 and 85-2822 (Pet. App. 8a-9a, 20a-21a) are reported at 795 F.2d 1011 (Table); the opinions of the court of appeals in Nos. 85-1061, 85-2813, 85-2815, 85-2816, 85-2817, and 85-2819 (Pet. App. 6a-7a, 3a-4a, 5a-6a, 10a, 12a-13a, 16a-17a) are reported at 795 F.2d 1012 (Table); the opinions of the court of appeals in Nos. 85-1065, 85-1066, and 85-1067 (Pet. App. 17a-18a, 14a-15a, 1a-2a) are reported at 795 F.2d 1014 (Table). Two of the decisions of the Merit Systems Protection Board (Pet. App. 22a-29a, 30a-40a) are reported at 18 M.S.P.R. 364 and 27 M.S.P.R. 690, respectively. The third administrative decision (Pet. App. 41a-57a) is unreported.

JURISDICTION

The judgments of the court of appeals in Nos. 85-1063 and 85-2822 were entered on April 11, 1986; the judgments

in Nos. 85-1061, 85-2813, 85-2815, 85-2816, 85-2817, and 85-2819 were entered on April 14, 1986; the judgments in Nos. 85-1065 and 85-1066 were entered on April 23, 1986; and the judgment in No. 85-1067 was entered on April 25, 1986. Petitions for rehearing in Nos. 85-1063, 85-2813, 85-2817, and 85-2822 were denied on May 16, 1986 (Pet. App. 9a, 4a, 13a, 21a); a petition for rehearing in No. 85-1065 was denied on May 21, 1986 (Pet. App. 19a); a petition for rehearing in No. 85-2816 was denied on May 27, 1986 (Pet. App. 11a); and a petition for rehearing in No. 85-1066 was denied on June 23, 1986 (Pet. App. 15a). On July 25, 1986, Chief Justice Burger issued an order extending the time within which to file a petition for a writ of certiorari to and including September 2, 1986, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners, former air traffic controllers, challenge their removal from federal employment following the air traffic controllers' strike in 1981. The background of the strike and the course of the subsequent litigation are set forth in our brief in opposition in *Campbell* v. *Department of Transportation, FAA,* cert. denied, 469 U.S. 881 (1984), one of a number of other cases arising out of the strike.[1] Petitioners' discharges were upheld by the Merit Systems Protection Board and the court of appeals. Petitioners' arguments before this Court do not concern the substance of those decisions but rather relate solely to the procedures followed by the court of appeals in reviewing the Board's decisions (Pet. 3). We therefore will discuss the facts relating to the adoption of these procedures by the court of appeals, not the particular factual circum-

[1] Copies of our brief in *Campbell* have been sent to counsel for petitioners.

stances surrounding petitioners' discharges.[2]

On January 18, 1983, the Merit Systems Protection Board (MSPB) published a notice in the Federal Register concerning the adjudication by the Board of air traffic controller discharge cases. The Board observed that more than 10,000 appeals by discharged air traffic controllers were "pending before the Board at some stage of the adjudicatory process" (48 Fed. Reg. 2235). It stated that "[b]ecause the Board's adjudication of pending petitions for review will address issues of law common to large numbers of pending appeals, the Board believes it appropriate to provide an opportunity for the filing of amicus briefs addressing such common issues raised in certain cases currently pending before it" (*ibid.*). The notice invited "interested parties" to file amicus briefs in five specified cases addressing four issues identified by the Board (*id.* at 2235-2236).

At the time the Board issued this notice, petitions for review of two decisions of the full Board in controller discharge cases were pending before the court of appeals. See *Schapansky* v. *Department of Transportation, FAA,* 735 F.2d 477 (Fed. Cir.), cert. denied, 469 U.S. 1018 (1984); *Johnson* v. *Department of Transportation, FAA,* 735 F.2d 510 (Fed. Cir. 1984). Three other petitions for review were pending in cases in which the discharged air traffic controllers had elected not to seek review by the full Board of the adverse decisions of the presiding officials. Pursuant to 5 C.F.R. 1201.113(a), the presiding officials' decisions became the final decisions of the Board in those cases. See *Ferrando* v. *Department of Transportation, FAA,* 771 F.2d 489 (Fed. Cir. 1985).

The government filed a motion for the suspension of proceedings in the three cases in which the full Board had not acted, arguing that it was appropriate for the court of

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[2] The relevant facts are discussed in the Board's decisions upholding the discharges. See Pet. App. 22a-57a.

appeals to stay its hand because the Board's Federal Register notice indicated that the full Board planned to address the legal issues presented in those cases. Since the three decisions of the presiding officials did not bind the full Board (see *Clark* v. *Department of the Navy,* 12 M.S.P.R. 428 (1982)), the government suggested that the court allow the full Board to express its views before the court rendered its decision regarding these legal issues. The motion to stay proceedings in the three cases was granted on February 15, 1983.

On February 24, 1983, a panel of the court of appeals, acting sua sponte, issued an order suspending proceedings in all other cases commenced by air traffic controllers; the order stated that the stay would remain in effect until the final disposition by the court of appeals of the two pending petitions for review of full Board decisions and of the five cases identified in the Board's Federal Register notice (App., *infra,* 1a-2a). The court observed that "[t]he decisions of this court in [the] five cases [identified by the Board] and the two cases already before us that the Board itself has reviewed are expected to determine most, or perhaps all, of the legal issues in the air traffic controllers litigation" (*id.* at 2a). It concluded that a stay of proceedings was appropriate because, "in view of the large number of cases, it is appropriate that this court first determine the common controlling legal issues as soon as possible and thus avoid repetitious and unnecessary decision of the same issues in many cases" (*ibid.*).

The Board issued its decisions in the lead cases on April 25, 1983.[3] The air traffic controllers sought review in the

[3] *Adams* v. *Department of Transportation, FAA,* 15 M.S.P.R. 72 (1983); *Anderson* v. *Department of Transportation, FAA,* 15 M.S.P.R. 157 (1983); *Baracco* v. *Department of Transportation, FAA,* 15 M.S.P.R. 112 (1983); *Campbell* v. *Department of Transportation, FAA,* 15 M.S.P.R. 92 (1983); *Kays* v. *Department of Transportation, FAA,* 15 M.S.P.R. 62 (1983); *Martel* v. *Department of Transportation, FAA,* 15 M.S.P.R. 141 (1983); and *Noa* v. *Department of Transportation, FAA,* 15 M.S.P.R. 126 (1983).

court of appeals and, after briefing by the parties and several amici, the court issued its decisions on May 18, 1984.[4] A number of the unsuccessful air traffic controllers filed petitions for writs of certiorari; the petitions were denied. *Schapansky* v. *Department of Transportation, FAA*, 735 F.2d 477 (Fed. Cir.), cert. denied, 469 U.S. 1018 (1984); *Anderson* v. *Department of Transportation, FAA*, 735 F.2d 537 (Fed. Cir.), cert. denied, 469 U.S. 1018 (1984); *Campbell* v. *Department of Transportation, FAA*, 735 F.2d 497 (Fed. Cir.), cert. denied, 469 U.S. 881 (1984).

On December 10, 1984, the court of appeals issued a notice to the parties in the air traffic controller cases stating that the stay of the pending cases would be lifted effective January 10, 1985. The notice stated that prior to that date a party whose case had been stayed must "withdraw [his] present petition for review or file a renewed petition. If [the party does] neither, [his] petition will be dismissed" (App., *infra*, 3a). The court stated that "[a]ny renewed petition must include a statement of the issues relied on and not decided in any of the 'Lead Cases,' " and it "again direct[ed] attention to the impropriety of frivolous appeals" (*ibid.* (footnote omitted)). Petitioners'

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[4] The court issued 11 decisions in the seven cases. The decisions are *Adams* v. *Department of Transportation, FAA*, 735 F.2d 488 (Fed. Cir. 1984); *Anderson* v. *Department of Transportation, FAA*, 735 F.2d 537 (Fed. Cir. 1984); *Campbell* v. *Department of Transportation, FAA*, 735 F.2d 497 (Fed. Cir. 1984); *DiMasso* v. *Department of Transportation, FAA*, 735 F.2d 526 (Fed. Cir. 1984); *Dorrance* v. *Department of Transportation, FAA*, 735 F.2d 516 (Fed. Cir. 1984); *Johnson* v. *Department of Transportation, FAA*, 735 F.2d 510 (Fed. Cir. 1984); *Letenyei* v. *Department of Transportation, FAA*, 735 F.2d 528 (Fed. Cir. 1984); *Martel* v. *Department of Transportation, FAA*, 735 F.2d 504 (Fed. Cir. 1984); *Moylan* v. *Department of Transportation, FAA*, 735 F.2d 524 (Fed. Cir. 1984); *Novotny* v. *Department of Transportation, FAA*, 735 F.2d 521 (Fed. Cir. 1984); and *Schapansky* v. *Department of Transportation, FAA*, 735 F.2d 477 (Fed. Cir. 1984).

cases were among those decided by three-judge panels of the court of appeals after the stay was lifted.

ARGUMENT

Petitioners raise a variety of challenges to the procedures adopted by the court of appeals to provide for orderly adjudication of the unprecedented number of government employee discharge cases resulting from the illegal strike by air traffic controllers. Petitioners do not assert that there is any conflict among the courts of appeals with regard to the question presented in this case. Moreover, their arguments are wholly without merit. Further review by this Court is not warranted.

1. Petitioners assert (Pet. 10-15) that the court of appeals' "lead case" approach violated their due process rights. This argument rests upon a misunderstanding of the court of appeals' procedural rules.

Petitioners attempt to create the impression that the court of appeals utilized unfair procedures in adopting the lead case approach.[5] They assert that "a single judge" suspended proceedings in the air traffic controller cases pursuant to a motion filed by the government (Pet. 11), contend that none of the air traffic controllers were permitted to respond to that motion, and imply that the government selected the lead cases (*id.* at 12). In fact, as described above, the order suspending proceedings in all air traffic controller cases was issued sua sponte by a three-judge panel; petitioners could have challenged that order by filing a motion for reconsideration. And the lead cases were not selected by the government. The method by which the lead cases were selected is spelled out in the

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[5] Petitioners do not appear to dispute the court of appeals' authority to adopt these procedural rules. See *Thomas* v. *Arn*, No. 84-5630 (Dec. 4, 1985), slip op. 6 ("[i]t cannot be doubted that the courts of appeals have supervisory powers that permit at the least, the promulgation of procedural rules governing the management of litigation").

court of appeals' order—two of the cases already were pending before the court and the other five cases were those that had been selected as lead cases by the MSPB (App., *infra*, 1a-2a).[6] Thus, there were no procedural irregularities in the adoption of the lead case approach by the court of appeals.

Petitioners also challenge the substantive effect of the lead case approach, asserting that they were denied due process because the court of appeals applied "issue preclusion" to reject their petitions for review of the decisions of the Merit Systems Protection Board (Pet. 12-15). Petitioners have confused issue preclusion with the operation of the doctrine of stare decisis. When a lower court applies a decision of this Court to reject the claim of a party in a different case, the lower court is not invoking the doctrine of issue preclusion; it is simply obeying the commands of stare decisis. The court of appeals' decisions in these cases similarly do not rest upon the doctrine of issue preclusion; they instead reflect each panel's obligation to apply the legal rules adopted by a prior panel (see, *e.g.*, *Bowen* v. *Department of Transportation, FAA*, 769 F.2d 753, 755 n.3 (Fed. Cir. 1985)). Petitioners were entitled to seek panel rehearing and suggest rehearing en banc if they wished to challenge those prior legal determinations, but they cannot insist that each panel examine anew every

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[6] Petitioners assert (Pet. 4-5) that the court must have been assuming, when it selected the cases pending before the MSPB as lead cases, that the controllers' claims would be rejected by the Board because only employees may seek judicial review of adverse decisions of the MSPB. But petitioners' premise is incorrect: the government may in certain circumstances seek judicial review of an adverse MSPB decision (see 5 U.S.C. 7703(d)), and in view of the importance of the Board's decisions in the five lead cases, it would have been reasonable for the court to assume that the government would seek judicial review in the event the discharges were overturned by the Board. In any event, the court's expectations, if any, with respect to the Board's decisions are not relevant to any rights of petitioners.

legal issue in every case. The court of appeals' adherence to settled principles of stare decisis did not violate due process.[7]

2. Petitioners also argue that their due process rights were violated by the method by which judges were assigned to the panels that heard their cases, the court of appeals' refusal to allow oral argument, and the brevity of the decisions issued by the court of appeals. There is no merit to any of these claims.

First, petitioners are in error in contending that their rights were violated by the composition of the court of appeals' panels. As a threshold matter, petitioners' claim relates principally to the panels that decided cases filed by other air traffic controllers. See Pet. 7 (referring to "[t]he first ninety-nine controller cases decided after the lead case disposition"). Indeed, they admit that when their cases were decided "[t]he number of panels was increased to more closely simulate ordinary rotation," but assert—without citing any factual support—that "the cases were not assigned on a blind rotation basis" (Pet. 9).

Petitioners have no statutory or constitutional right to insist that the court of appeals utilize a particular selection

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[7] Petitioners attempt to buttress their claim by referring to the facts of specific cases, asserting, for example (Pet. 13-14), that petitioner Richard Delutri was improperly discharged. The Board's decision indicates that Delutri was away from his duty post without leave and that Delutri failed to show that he had filed a request for sick leave (Pet. App. 45a-46a); the court of appeals concluded that the Board's decision was supported by substantial evidence (*id.* at 8a-9a). The court of appeals reached the same conclusion with respect to the claims of petitioners Patrick Lydon and Thomas A. Toepfer (Pet. App. 12a-13a, 20a-21a). There is no warrant for review by this Court of these factbound issues.

method to determine the composition of its panels. Section 46(b) of Title 28 does provide for the rotation of Federal Circuit judges from panel to panel, but the provision does not specify a particular method of rotation or indicate that it confers upon litigants a right to challenge the composition of a particular panel. Here, where petitioners admit that the court of appeals did rotate judges from panel to panel, and petitioners' cases all were heard by properly appointed judges who were not biased or personally interested in the cases, there was neither a constitutional nor a statutory violation.[8]

Second, there is no basis for petitioners' claim that they were improperly denied the opportunity to present oral argument. Rule 34(a) of the Federal Rules of Appellate Procedure provides that oral argument may be dispensed with as long as the court by local rule affords a party "an opportunity to file a statement setting forth the reasons why oral argument should be heard" and the panel unanimously concludes that oral argument is not needed. Petitioners were afforded an opportunity to request oral argument (see Fed. Cir. R. 15(a)), and the court in each case indicated that it had considered these requests but that oral argument was not necessary (Pet. App. 2a, 3a, 5a, 7a, 8a, 10a, 12a, 14a, 16a, 18a, 20a). Rule 34(a) requires no more.[9]

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[8] Petitioners state (Pet. 7) that the court of appeals acted improperly because its February 1983 order directed the MSPB "to withhold transmission of the certified lists normally submitted to the court in lieu of the record" (App., *infra*, 2a). They imply that the court was therefore unable to review the MSPB's factual findings. But the parties in cases before the Federal Circuit must reproduce in the joint appendix the relevant portions of the record (Fed. Cir. R. 12). The fact that the Board was not required to file a certified list of docket entries thus could not affect the court's ability to review the Board's decisions.

[9] Petitioners claim (Pet. 7-8, 16) that they were denied oral argument under a blanket rule applicable to all air traffic controller cases

Finally, petitioners assert (Pet. 16-17) that the decisions issued by the court of appeals violate due process because they are not sufficiently detailed. But there is no rule of law that requires a court to write at length when it decides a case. This is especially true where, as here, the legal issues are fully addressed in prior opinions and the court's review of factual issues is highly deferential (see 5 U.S.C. 7703(c) (substantial evidence standard applies to review of MSPB decisions)). Since the court of appeals' decisions in these cases are sufficiently detailed to make clear the grounds for decision, petitioners were not deprived of due process.[10]

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and that their cases were not afforded the individual consideration required by Rule 34(a). But their support for this claim relates to the court's alleged practice in prior cases; petitioners admit that they were given an opportunity to present reasons why oral argument was needed (Pet. 8). Their assertion (*id.* at 8, 16) that a request for reasons that oral argument is warranted may only be issued by the panel that will hear the case is plainly incorrect; other circuits have adopted rules requiring a party to state in his brief the reasons that oral argument is appropriate. See, *e.g.*, Fifth Cir. R. 28.2.4; Eleventh Cir. R. 22(f)(4).

[10] Petitioners' reliance on *Dennison Manufacturing Co.* v. *Panduit Corp.*, No. 85-1150 (Apr. 21, 1986), is misplaced. This Court remanded the case to the court of appeals because that court had not expressly addressed the applicability of Fed. R. Civ. P. 52(a) to its review of the district court's factual findings. There is no claim here that the court of appeals failed to address a legal issue relevant to petitioners' claims.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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NOVEMBER 1986

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

In re

AIR TRAFFIC CONTROLLERS LITIGATION

Before FRIEDMAN, RICH, and DAVIS, *Circuit Judges.*

ORDER

There are pending before the court more than 225 petitions for review by former air traffic controllers challenging decisions of the Merit Systems Protection Board (the Board) sustaining the discharge of the controllers by the Federal Aviation Administration (the Administration) for participation in an illegal strike in August 1981. In most of the cases the petitioners filed suit in this court following decisions of various regional offices of the Board and did not ask the Board itself to review the cases. In two of the cases, however, the petitioners sought review by the Board of regional office decision and then filed petitions to review the final Board decisions in this court.[1]

The various cases raise a number of issues, including challenges to both the Administration's discharge of the controllers and the Board's affirmance of that action.

In addition to the cases before the court, the Board advises that it has pending more than 1,500 cases challenging decision of its regional offices. The Board will review five of those cases on an expedited basis as "lead cases,"[2] and

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[1] *Schapansky* v. *Department of Transportation,* Appeal No. 83-663; *Johnson* v. *Department of Transportation,* Appeal No. 83-664.

[2] *Richard T. Adams, et al.* v. *Federal Aviation Administration,* MSPB No. NY075281F0347; *Kipp C. Anderson* v. *Federal Aviation Administration,* MSPB No. SL075281F0347; *Gary S. Baracco* v. *Federal Aviation Administration,* MSPB No. DC075281F0895;

it is expected that we will review Board decisions in those five cases. The decisions of this court in those five cases and the two cases already before us that the Board itself has reviewed are expected to determine most, or perhaps all, of the legal issues in the air traffic controllers litigation.

On February 15, 1983, we suspended proceedings in three of the cases before us in which the petitioners directly challenged the decisions of the Board regional offices but did not seek review by the Board.[3] We did so because, in view of the large number of cases, it is appropriate that this court first determine the common controlling legal issues as soon as possible and thus avoid repetitious and unnecessary decision of the same issues in many cases.

We conclude that we should follow the same practice in the remaining cases until the seven lead cases finally have been determined.

Accordingly, IT IS ORDERED THAT:

1. All appeals from the Board, except for the seven cases listed in footnotes 1 and 2, in the Air Traffic Controllers litigation now pending before this court are stayed pending final disposition of those seven cases.

2. The Board is to withhold transmission of the certified lists normally submitted to the court in lieu of the record.

3. Pending disposition of the seven cases, the Clerk of this court is directed to retain in a suspense file all pending petitions for review filed by Air Traffic Controllers, with accompanying fees, and to withhold docketing of any petition as an appeal.

FEBRUARY 24, 1983

Robert L. Campbell v. *Federal Aviation Administration,* MSPB No. DE075281F0697; and *Joseph R. Noa (Richard E. Golle, et al.)* v. *Federal Aviation Administration,* MSPB No. NY075281F0697.

[3] *Thomas R. Ferrando* v. *United States,* No. 83-687; *John M. Erickson* v. *United States,* No. 83-688; and *Michael J. Zullo* v. *United States,* No. 83-689.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
717 Madison Place, N.W.
Washington, D.C. 20439

NOTICE TO COUNSEL AND PETITIONERS IN AIR TRAFFIC CONTROLLER LITIGATION

The Supreme Court has completed final disposition of all "Lead Cases" and mandates have been issued in those cases to the Merit Systems Protection Board.

In accord with this court's notice of May 18, 1984, you are hereby notified that:

(1.) The suspension entered on February 24, 1983 will remain in effect to and including January 10, 1985. Before that date you must withdraw your present petition for review or file a renewed petition. If you do neither, your petition will be dismissed.

(2.) Any renewed petition must include a statement of the issues relied on and not decided in any of the "Lead Cases".[1]

(3.) Checks received with the initial petition are being returned with this notice. If you file a new petition, you must enclose a new check for the $65.00 filing fee.

(4.) The Court again directs attention to the impropriety of frivolous appeals. *Asberry* v. *United States,* 692 F.2nd 1378 (1982); *Connell* v. *Sears,* 722 F.2nd 1542 (1983); *Beachboard* v. *United States,* 727 F.2d 1092 (1984); and *Wright* v. *United States,* 728 F.2d 1459 (1984).

(5.) If you file a new petition, on or before January 10, 1985, your appeal will be docketed on receipt of that petition. You must file your brief within 60 days thereafter.

(6.) If you file a new petition, a certified list will not be required. If need arises, the list of documents of record may be ordered by the court, on motion or *sua sponte.*

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[1] The "Lead Cases" can be found in 735 F.2d, pages 477 through 549.

(7.) The Court will not act on motions of respondent to dismiss or for summary affirmance in relation to a new petition until petitioner's brief/appendix has been filed.

FOR THE COURT

/s/ GEORGE E. HUTCHINSON
Clerk

DECEMBER 10, 1984

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